

HR Weekly Podcast

July 30, 2008

Today is July 30, 2008, and welcome to the HR Weekly Podcast from the State Office of Human Resources. This week's topic concerns some common issues relating to non-exempt and exempt status under the Fair Labor Standards Act, or the FLSA.

One of the country's oldest federal laws, the FLSA requires employers to pay employees a minimum wage. On July 24, 2008, the minimum wage increased to \$6.55 per hour and will increase to \$7.25 per hour on July 24, 2009. OHR recently increased the minimum of Band 1 to comply with this year's increase. Employees are to be paid 1 1/2 times their "regular rate" for all hours worked in excess of forty hours in a standard workweek or may be granted compensatory time at a rate of 1 1/2 hours for each hour of overtime worked unless they are considered exempt.

Generally, employees are presumed to be non-exempt and the employer is responsible for determining that an employee is exempt. Incorrectly determining whether an employee is non-exempt or exempt can lead to uncompensated overtime and can quickly amount to significant money owed to the employee. Therefore, properly determining whether an employee is non-exempt or exempt is the key. To make that determination appropriately, the employer needs to review the employee's position description against the employee's actual job duties. The position description should be revised to match the job duties. There are tests to determine if an employee falls into one of the three primary exemptions: executive, administrative, or professional. The "salary basis test" looks at whether an employee is paid a weekly salary regardless of the quality or quantity of work performed as long as the employee performs any work. These employees must be paid a minimum of \$455 per week. The "duties test" looks at the primary job duties of the employee, the amount of time spent by the employee on the exempt work, and the employee's freedom from direct supervision. The use of these tests can assist employers in determining whether an employee is non-exempt or exempt.

Another common issue is the failure to pay overtime. The employer may have properly determined that the employee is non-exempt, but fails to pay overtime for all hours worked in excess of 40 hours in a standard workweek. Failure to pay overtime may be in part due to incorrectly computing hours worked. There are specific rules for an employer to follow to compute hours worked correctly. For example, rest periods from 5 to 20 minutes in length are generally compensable. But, meal periods that are at least 30 minutes in length and where the employee is completely relieved of duties are generally not compensable. On-call time is generally not compensable if the employee is not confined to a particular place and not restricted in using the time for his or her own purposes. When calculating travel time, all working time is compensable, regardless of time or location. All travel time that occurs during an employee's regular work hours, even on a non-work day, is compensable. As to same day travel, all travel time is compensable except what could substitute for ordinary home to work travel.

To avoid some of these common issues, there are several approaches that an employer can take. An employer can review the employee's job duties and see if the employee can be regarded as exempt. Remember, it is not necessarily what the position description lists; instead, it is what the employee actually does that will control whether the employee is non-exempt or exempt. Also, an employer can review its timekeeping and pay practices to ensure compliance with the FLSA. In addition, employers can ensure that their supervisors and managers are trained on correctly computing hours worked so that the calculation of overtime will be correct.

If you have questions about this topic, please contact your HR consultant at 803-737-0900.

Thank you.